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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. FREDDIE HOLLMAN, Defendant and Appellant.	A150795 (Contra Costa County Super. Ct. No. 5-160032-9)

A jury convicted Freddie Hollman of the attempted willful, deliberate, and premeditated murder of Harold McKneely (Pen. Code, §§ 187, subd. (a), 664, subd. (a); count one),[1] shooting at an inhabited dwelling (§ 246; count two), and possession of a firearm by a felon (§ 29800, subd. (a)(1); count three). As to the first two counts, the jury found true enhancement allegations that Hollman personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). Hollman appeals, arguing the trial court improperly limited his right to cross-examine McKneely, erred in calculating his aggregate sentence, and must consider striking the term imposed for the firearm enhancement under an amendment to section 12022.53, subdivision (h). We agree on the final point and also order correction of a clerical error in the abstract of judgment. Otherwise, we affirm.

[1] Undesignated statutory references are to the Penal Code.

FACTS

A.

On June 17, 2015, Hollman went to McKneely's apartment to collect on a bet Hollman won on the outcome of a professional basketball championship series. The two men argued when McKneely refused to pay.

McKneely testified he shut his front door after threatening to hit Hollman if he refused to leave. McKneely opened the door a minute later. Hollman was still there and said, "I got to kill you," drew a gun from his waistband, pointed the gun at McKneely, and started shooting from the porch. McKneely believed the gun was a .40 caliber Smith & Wesson handgun. The first shot hit McKneely in the stomach, and he was hit at least twice more as he fell backwards. When Hollman stopped shooting, he walked away.

Hollman, in contrast, testified that when McKneely reopened the door, he punched Hollman in the face and drew a firearm from his waistband. Hollman grabbed the gun, as McNeely's hand "slipped off of it." Fearing for his life, Hollman pulled the trigger multiple times as the two struggled for control of the weapon. Hollman ran from the scene and threw the gun in a dumpster.

Another resident in the apartment complex witnessed the shooting, and her testimony was largely consistent with McKneely's. Police responding to the scene discovered McKneely lying on his back on his apartment floor, marijuana that appeared packaged for sale, and over $300 in cash. When asked who shot him, McKneely identified a friend named "Freddie."

McKneely had been shot four times and suffered seven entry and exit wounds in his abdomen, thigh, and pelvis. Based on the diameter of gunpowder residue around one bullet hole in McKneely's clothing, a criminalist opined the firearm had been discharged from a distance of no more than 18 inches, which was consistent with the shooter standing between three and four feet away, with his arm extended. Shell casings and spent ammunition found at the scene indicated a .40-caliber Smith & Wesson handgun was likely used.

Hollman was arrested on the day of the shooting and lied to police about his involvement. Recordings of two interviews were played for the jury. Initially, Hollman asserted he did not know why he had been arrested, then suggested he was elsewhere at the time of the shooting. Hollman did not claim he shot McKneely in self-defense.

Hollman admitted prior felony convictions for battery causing serious bodily injury, domestic violence, forgery, and petty theft with a prior conviction. A friend of Hollman's and the son of Hollman's fiancé testified they had never seen Hollman with a firearm. Hollman testified he frequently bought marijuana from McKneely and frequently saw a gun in McKneely's possession. Hollman denied bringing a gun to McKneely's.

McKneely admitted he sold marijuana at the time of the shooting, in June 2015, and subsequently was convicted for possession of marijuana for sale and possession of a firearm by a felon, in March 2016. However, he denied having a gun on the day of the shooting and denied hitting or pushing Hollman. McKneely also admitted he was arrested in 2012 for possession of marijuana for sale.

Additionally, two incidents were admitted to show McKneely's character for violence. (See Evid. Code, § 1103, subd. (a).) In 2011, while McKneely was being evicted, he confronted his former landlord, physically blocked her from walking away, gestured as if he was concealing a weapon, and threatened to shoot her and her son and nephew. In approximately 2008, when another former landlord had her daughter attempt to collect rent from McKneely, he became aggressive, pushed her, and threatened to "have some girls . . . take care of [her]."

B.

The jury returned guilty verdicts on all counts, found the attempted murder was willful, deliberate, and premeditated, and found all enhancement allegations true. Hollman was sentenced to an aggregate term of 32 years to life, comprised of life with the possibility of parole for attempted murder, with a minimum parole eligibility of seven years (§ 3046, subd. (a)), plus a consecutive 25-year term for intentional discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)). Punishment on count two

and additional enhancements was stayed pursuant to section 654, and a concurrent two-year term was imposed on count three. Hollman filed a timely notice of appeal.

DISCUSSION

A.

We reject Hollman's argument that the trial court violated state law and the due process and confrontation clauses of the Constitution by excluding factual details underlying McKneely's 2016 criminal convictions.

1.

The constitutional right of confrontation includes the right to cross-examine adverse witnesses on matters reflecting on their credibility. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) However, the confrontation clause guarantees only an opportunity for effective cross-examination, "not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20.) Judges retain wide latitude to impose reasonable limits on cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) A trial court's limitation on cross-examination violates the confrontation clause only when "a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted." (*Quartermain*, at pp. 623–624.)

The federal Constitution also guarantees criminal defendants " ' "a meaningful opportunity to present a complete defense." ' " (*Nevada v. Jackson* (2013) 569 U.S. 505, 509.) But, " '[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' " (*People v. Dement* (2011) 53 Cal.4th 1, 52, disapproved on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) "While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to

exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326.)

We review evidentiary rulings for abuse of discretion. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.) " 'Under the abuse of discretion standard, "a trial court's ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*Id*. at pp. 1328–1329.)

2.

Before trial, the People moved in limine to limit the defense's admission of evidence relating to McKneely's criminal history. McKneely and his son were arrested in March 2016—nine months after the shooting—when police executed a search warrant at McKneely's apartment and found three loaded firearms (one stolen; two unregistered), ammunition, and 264 grams of packaged marijuana. McKneely pled no contest to one count of unlawful possession of a firearm (§ 29800, subd. (a)) and possession of marijuana for sale (Health & Saf. Code, § 11359). The People conceded the convictions could be used to impeach McKneely's credibility (Evid. Code, § 788) but contended they should be sanitized to prevent the jury from impermissibly inferring McKneely possessed a gun nine months earlier when the shooting took place (*id.*, § 1101, subd. (a)). The trial court concluded neither conviction showed a character for violence and was not admissible on that basis. (See *id.*, § 1103, subd. (a).) The trial court admitted the fact of McKneely's 2016 convictions for purposes of impeaching McKneely's credibility but excluded evidence of the particular circumstances underlying those convictions.

On direct examination in the People's case-in-chief, McKneely answered affirmatively when asked if, in March 2016, he was convicted of "felon in *possession of ammunition* and possession of marijuana." (Italics added.) On cross-examination, defense counsel admitted a photograph of a gun, which McKneely testified was similar to the gun used on June 17, 2015. When defense counsel began, "you actually were in possession of that exact gun on," the prosecutor objected, and an unreported chambers

conference was held. Shortly thereafter, the following exchange occurred between defense counsel and McKneely:

"Q. When you opened up that door [on June 17, 2015], that is when you had a gun similar to *that gun*; correct?

"A. No, I never had a gun. I got a gun after I got shot. Same gun, Smith & Wesson.

"Q. Is that gun for self-protection?

"A. Yes, it was.

"Q. . . . [D]id you get multiple guns?

"A. No, I only got one.

"Q. Why did you get that gun?

"A. Because I got shot." (Italics added.)

Immediately thereafter, defense counsel showed McKneely another photograph and asked, "is that the gun that was in your possession in March that you were arrested for?" The trial court sustained the prosecutor's objection and held another unreported chambers conference.

The next day, defense counsel sought further clarification from the trial court, specifically regarding whether he could ask McKneely when he purchased the gun he was convicted of possessing in March 2016. The trial court sustained the People's objections, under Evidence Code sections 352, 787, and 1101, explaining: "I have admitted the 2016 convictions . . . only for impeachment . . . . [F]or that purpose, the fact of the convictions is all that is admissible and underlying facts are not admissible." With respect to any broader relevance to Hollman's (as yet unasserted) self-defense claim, the trial court said, "[t]he subsequent purchase of a firearm is irrelevant absent evidence of his possession or use of a firearm on the day in question."

During the defense case, after Hollman testified McKneely drew the gun and Hollman shot him with it in self-defense, defense counsel again sought admission of the facts underlying McKneely's March 2016 arrest. In particular, he sought to admit the testimony of two sheriff's deputies regarding the circumstances in which three firearms

were found in McKneely's apartment in March 2016. Defense counsel offered two alternative theories. He contended the circumstances of McKneely's 2016 arrest supported Hollman's self-defense theory because they showed the .40-caliber Smith & Wesson was McKneely's "signature firearm." Conceding this was a propensity theory, defense counsel also sought admission for impeachment purposes, highlighting McKneely's testimony he had obtained a single gun for personal protection and stating it was "clear" from one of the deputy's arrest reports that "the gun was not purchased simply for personal protection but was purchased . . . to protect [McKneely's] drug stash."

The People objected, under Evidence Code sections 352 and 1101, stating the evidence would only show McKneely's propensity to possess firearms and would necessitate calling rebuttal witnesses, such as McKneely's son, who "took responsibility" for all three guns. Defense counsel argued the circumstances of the March 2016 arrest were admissible under Evidence Code section 1101, subdivision (b), to show both motive and intent on June 17, 2015.

The trial court concluded the probative value of the evidence was insufficient to overcome the prejudicial propensity inference. (Evid. Code, §§ 352, 1101, subd. (a)). The trial court also rejected Hollman's impeachment theory, stating, "I don't see how possession of marijuana and guns eight months later proves [McKneely] did not possess that gun for self-defense. [¶] A marijuana dealer may be just as interested in self-defense as a non-marijuana dealer."

3.

Hollman first contends the evidence was admissible to impeach McKneely's credibility and asserts the trial court violated his confrontation rights by depriving him of the opportunity to cross-examine McKneely on that subject.

Generally, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) " '[B]ut evidence of

uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes.' " (*People v. Foster, supra*, 50 Cal.4th at p. 1328; accord, Evid. Code, § 1101, subd. (b).) Furthermore, Evidence Code section 1101 does not affect "the admissibility of evidence offered to support or attack the credibility of a witness." (Evid. Code, § 1101, subd. (c).)

"Under California law, the right to cross-examine or impeach the credibility of a witness concerning a felony conviction does not extend to the facts underlying the offense." (*People v. Casares* (2016) 62 Cal.4th 808, 830; *People v. Heckathorne* (1988) 202 Cal.App.3d 458, 462.) However, if the witness seeks to mislead the jury or minimize the facts of the conviction, he or she may be questioned further. (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 120; *People v. Smith* (2003) 30 Cal.4th 581, 634.) Furthermore, " '[t]he latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' " (*People v. Ayala* (2000) 23 Cal.4th 225, 301.)

Hollman maintains the circumstances underlying McKneely's 2016 convictions were admissible because McKneely attempted to mislead the jury or minimize his conduct. In particular, Hollman insists McKneely's cross-examination testimony was misleading because McKneely stated he acquired only a single gun (rather than the three found at his apartment) and did so to protect himself (rather than to protect his marijuana stash).

We are not persuaded. First, we do not agree that McNeely did, in fact, minimize the facts of the conviction or try to mislead the jury. He testified that he acquired one gun, not multiple guns. That testimony is not inconsistent with his conviction: he pled no contest to one count of possessing a firearm. McNeely also testified he acquired the gun for self-protection. The conviction itself does not indicate the reason he acquired the gun. He pled guilty to possession of marijuana for sale, but that fact does not speak to

why he acquired the gun. As the trial court observed, "A marijuana dealer may be just as interested in self-defense as a non-marijuana dealer."

Second, the trial court did not abuse its discretion in concluding any probative value of the evidence was substantially outweighed by its potential for undue consumption of time, prejudice, and confusion. (Evid. Code, § 352; *People v. Gutierrez* (2018) 28 Cal.App.5th 85, 89 ["conduct underlying a felony conviction is admissible when it is relevant to impeach a witness, unless the trial court finds that it is more prejudicial than probative"].) The evidentiary detour Hollman proposed would have necessitated admitting additional testimony, not only from McKneely, but also from the 2016 arresting officers and the People's rebuttal witnesses. Further, the jury would have had to evaluate those witnesses' credibility and decide disputed fact questions. Hollman concedes the facts of McKneely's arrest do not prove his testimony was false, they only support a "strong argument" to that effect. In other words, Hollman wanted to explore these issues in a "mini trial" that could have caused undue delay and confusion. Hollman has not shown the trial court's limitation was an abuse of discretion. (See *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448–449 [upholding exclusion of evidence, under § 352, of victim's subsequent acts of violence to prove his violent character at the time of the earlier crime].)

Hollman's reliance on *People v. Kennedy* (2005) 36 Cal.4th 595, disapproved on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 458–459, does not compel a contrary conclusion. In that case, the defendant challenged a ruling allowing the prosecution to question the defendant's friend about circumstances underlying the defendant's prior arrest involving firearms. The friend was called as a prosecution witness and testified, on defense cross-examination, he had never seen the defendant carry a gun. On redirect, the prosecutor elicited testimony about a time when the defendant, the friend, and another individual were arrested, and two pistols were found in their car. Our Supreme Court dismissed the defendant's claim that this was improper propensity evidence, concluding, first, the defendant forfeited the argument by failing to object at trial. (*Kennedy*, at pp. 619–620.) On the merits, "the questioning was proper to

impeach [defendant's friend] because [his] admission that he and defendant were arrested in a car in which guns were found raised doubts as to the veracity of [the friend's] previous statement on cross-examination . . . he had never seen defendant carry a gun. [¶] . . . Although the police report prepared at the time of the arrest stated that the persons in the car . . . claimed the guns belonged to [another individual], the prosecutor was not required to accept this claim as truthful." (*Id*. at p. 620.)

People v. Kennedy, supra, 36 Cal.4th 595, is distinguishable. The *Kennedy* defendant did not raise an Evidence Code section 352 objection. (*Kennedy,* at p. 620.) Moreover, unlike here, the impeachment evidence directly contradicted the witness's testimony.

Lastly, Hollman has not shown a violation of the confrontation clause. (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 680; *People v. Quartermain, supra,* 16 Cal.4th at p. 624.) We do not discount the probative value of evidence that McNeely had a history of firearm possession and drug dealing. But McKneely's credibility was unquestionably impeached with evidence of his March 2016 convictions for unlawful possession of a firearm and marijuana for sale. The jury also learned that, at the time of the shooting, McKneely was a marijuana dealer and had both marijuana and money from his drug dealing in his apartment. They learned that McKneely possessed, in March 2016, the same type of gun used in the shooting nine months earlier. The court also allowed Hollman to impeach McNeely with the conduct underlying a 2008 incident in which McNeely threatened to have some girls "take care of" his landlord's daughter; a 2011 incident in which McNeely threatened to shoot his landlord and her son and nephew and put his hand behind his back as if he had a gun; and a 2012 arrest for possession of marijuana for sale (which involved no gun). A reasonable jury would not have formed a significantly different impression of McKneely's credibility had he been further cross-examined regarding the circumstances of his March 2016 arrest. (*People v. Ardoin, supra,* 196 Cal.App.4th at pp. 121–123.)

4.

Hollman also contends the facts underlying McKneely's March 2016 arrest were relevant to corroborate his testimony that McKneely initially possessed the .40-caliber Smith & Wesson that Hollman used to shoot McNeely nine months earlier, on June 17, 2015. The People argue Hollman's proffered evidence was properly excluded as propensity evidence.

The People rely on *People v. Barnwell* (2007) 41 Cal.4th 1038 for the proposition that, to be admissible, "other weapons" evidence must be relevant on a point other than disposition. *Barnwell* was a capital case in which the trial court admitted rebuttal testimony that, a year before the murders, the defendant possessed a handgun similar to the murder weapon. (*Id.* at pp. 1044, 1055.) "Because the prosecution did not claim the weapon found [a year earlier] was the murder weapon," the trial court erred by admitting propensity evidence—to demonstrate the defendant's " '*propensity* to own or carry that type of weapon.' " (*Id*. at p. 1056.) "When the prosecution relies on evidence regarding a specific type of weapon, it is error to admit evidence that other weapons were found in the defendant's possession, for such evidence tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons."[2] (*Ibid*.)

Here, as in *People v. Barnwell, supra,* 41 Cal.4th 1038, Hollman does not claim the gun he used to shoot McKneely was among the three guns found in McKneely's apartment nine months later. That McKneely possessed a .40-caliber Smith & Wesson (or other guns) on a subsequent unrelated occasion raises no legitimate inference he possessed a different .40-caliber Smith & Wesson on the day of the shooting. As the trial court correctly put it, "[t]he argument is [merely] that he commonly possessed . . . guns." The court did not abuse its discretion.

Unlike the cases relied on by Hollman, the trial court did not exclude evidence of a third-party confession or similar exculpatory evidence. (See, e.g., *Chambers v.*

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[2] Hollman has abandoned his argument the evidence was admissible under Evidence Code section 1101, subdivision (b).

Mississippi (1973) 410 U.S. 284, 298–302.) The ruling does not implicate Hollman's federal constitutional right to present a defense.

B.

Hollman argues, and the People concede, the case should be remanded because a 2017 amendment to section 12022.53, subdivision (h) allows the trial court to decide whether the firearm enhancement should be stricken. We agree the trial court should have an opportunity to exercise its discretion. (See *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079–1082.)

C.

Assuming the trial court reimposes the firearm enhancement on remand, Hollman raises a purported sentencing error. He contends the trial court erred in calculating an aggregate term of 32 years to life for count one, comprised of an indeterminate life term, with seven years minimum parole eligibility (§ 3046, subd. (a)(1)),[3] for attempted murder and a consecutive term of 25 years to life for the firearm enhancement. Having already decided to remand so the trial court may exercise its discretion under section 12022.53, subdivision (h), we will not provide what might be only an advisory opinion on issues presented by Hollman's current sentence.

D.

In a footnote in his opening brief, Hollman asserts his abstract of judgment contains a clerical error. On Judicial Council Forms, form CR-292 for indeterminate sentencing on count one, section 2 misidentifies a stayed section 12022.5, subdivision (a) enhancement as a stayed enhancement under section "12022.25(a)." We will order the

[3] Section 3046 provides: "(a) An inmate imprisoned under a life sentence shall not be paroled until he or she has served the greater of the following: [¶] (1) A term of at least seven calendar years. [¶] (2) A term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole. [¶] (b) If two or more life sentences are ordered to run consecutively to each other pursuant to Section 669, an inmate so imprisoned shall not be paroled until he or she has served the term specified in subdivision (a) on each of the life sentences that are ordered to run consecutively."

abstract of judgment corrected. (See *People v. High* (2004) 119 Cal.App.4th 1192, 1200 [appellate courts may order correction of abstracts of judgment inaccurately reflecting oral judgment].)

DISPOSITION

Hollman's sentence for the firearm enhancement imposed on count one is vacated and the matter is remanded. The trial court is instructed to exercise its discretion under section 12022.53, subdivision (h). If the trial court elects not to strike or dismiss the firearm enhancement, it shall resentence Hollman for the firearm enhancement (§ 12022.53, subd. (d)). The trial court is further directed to prepare an amended indeterminate abstract of judgment correcting the clerical error identified in Discussion subsection D. The amended abstracts of judgment shall be forwarded to the appropriate agencies. In all other respects, the judgment is affirmed.

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BURNS, J.

WE CONCUR:

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JONES, P. J.

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SIMONS, J.

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